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**IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA
FIFTH APPELLATE DISTRICT**

In re BRANDON W., a Person Coming Under
the Juvenile Court Law.

THE PEOPLE,

Plaintiff and Respondent,

v.

BRANDON W.,

Defendant and Appellant.

F045931

(Super. Ct. No. JW099995-01)

OPINION

THE COURT*

APPEAL from a judgment of the Superior Court of Kern County. Richard J. Oberholzer, Judge.

Teresa M. Starinieri, under appointment by the Court of Appeal, for Defendant and Appellant.

* Before Dibiaso, Acting P.J., Vartabedian, J. and Harris, J.

Bill Lockyer, Attorney General, Robert R. Anderson, Chief Assistant Attorney General, Mary Jo Graves, Assistant Attorney General, Janis Shank McLean and John A. Bachman, Deputy Attorneys General, for Plaintiff and Respondent.

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In December 2003, appellant Brandon W., a minor, admitted an allegation contained in a juvenile wardship petition that he committed a violation of Penal Code section 496, subdivision (a) (receiving stolen property). In January 2004, following the disposition hearing, the court adjudged appellant a ward of the court; ordered placement and care vested with the probation department pending further order by the court; and ordered appellant to pay victim restitution in an amount to be determined. In April 2004, the court set the amount of restitution at \$20,000, and in July 2004, following a hearing, declared appellant jointly and severally liable for that amount. The instant appeal followed.

On appeal, appellant contends the court erred in finding him jointly and severally liable for restitution in the amount of \$20,000. We will reverse the order imposing joint and several liability for direct restitution in that amount and remand for further proceedings.

FACTUAL AND PROCEDURAL BACKGROUND

Facts¹

Jun and City Chung were staying with their daughter Kimberly Huey when, on October 23, 2003,² City³ discovered that \$30,000 in cash that she had placed in a dresser

¹ The factual statement is taken from the report of the probation office prepared in connection with the disposition hearing in the instant case.

² Except as otherwise indicated, further references to dates of events are to dates in 2003.

drawer in her daughter's home was missing. Mr. and Ms. Chung were missionaries and planned "to take [the money] back to [their] church in Russia." On October 24, Huey's 13-year-old daughter, Megan S., admitted to her mother she had taken the money from the dresser.

Thereafter, Megan told police the following. She took the entire \$30,000 from the dresser. On October 16, she gave appellant, age 13, and R.W., age 13, \$2,000 each. On October 21, she gave \$200 to Daniel M. and an additional \$200 to R.W. Over the next three days, she gave \$1,500 to various other friends.

On October 22, appellant and R.W. were at Megan's home and "saw she had the money." Megan was afraid appellant and R.W. would steal the money, so she moved it from under her bed to her closet. She later suspected that R.W. "possibly took a large part of the money, possibly \$15,000.00 to \$16,000.00." At some point, Megan gave appellant an additional \$2,000, apparently with the understanding that Jorge A., a friend of appellant's, would use the money to buy two motorcycles, one for appellant and one for R.W.

R.W. told police the following. He was with Megan when she found the \$30,000. A "couple of days later" he "took a large stack of the money from her closet and hid it [from Megan]" R.W. and appellant "put their money together and had approximately \$7,000.00," with which "they had their friend [Jorge] purchase two Kawasaki motorcycles for them." Appellant and R.W. also "purchased motorcycle riding gear consisting of boots, helmets and jerseys."

Appellant told the police that Megan telephoned him on October 10 and told him she had found \$30,000 in her grandmother's dresser drawer. He also told police Megan

³ For the sake of brevity and clarity, and not out of disrespect, we refer to City Chung by her first name.

gave him a total of \$400. Appellant “could not explain how he gained enough money to purchase a motorcycle.”

Police officers “were able to locate \$200.00 in cash and two motorcycles worth approximately \$4,884.75.”

A document entitled “Kern County Probation Department Restitution Determination,” dated April 4, 2004,⁴ states the victims “submitted claims for a loss of \$20,000.00,” indicating that the “total loss was \$30,000.00” but “\$10,000.00 in merchandise was recovered.”

Procedural Background

On January 7, the court ordered that appellant pay restitution in an amount to be determined. On April 8, the court set the amount of restitution at \$20,000.

On May 27, appellant filed a notice of motion and accompanying memorandum of points and authorities challenging the restitution order on the grounds that “he did not participate in or have knowledge of the original theft of \$30,000”; he “received only \$4,000 in cash”; and “some of the cash and items purchased by him with the stolen money was recovered.” The People filed a response in which they argued, “[appellant] entered into a conspiracy with Megan ... and [R.W.] to receive stolen property, distribute stolen property, spend stolen funds and deprive the victim of the original \$30,000 originally stolen by Megan” At a hearing on July 12, the court found appellant jointly and severally liable for the \$20,000 restitution amount on the grounds that “the minor is responsible for the acts because he was involved in a conspiracy to ... distribute the stolen property -- basically, the money -- and conceal it in the form of merchandise, et cetera.”

⁴ Further references to dates of events are to dates in 2004.

DISCUSSION

Appellant contends the court abused its discretion in finding him liable for the victims' \$20,000 loss because, he asserts, the record does not support the conclusion that his conduct was the cause of that loss.

Welfare and Institutions Code section 730.6⁵ governs restitution in cases in which a minor is adjudicated a ward of the court. Subdivision (a)(1) of section 730.6 provides: "It is the intent of the Legislature that a victim of conduct for which a minor is found to be a person described in Section 602 who incurs any economic loss *as a result of the minor's conduct* shall receive restitution directly from that minor." (Italics added.)

Subdivision (a)(2) of section 730.6 provides, in relevant part, that the court, upon finding a minor to be a person described in section 602, "shall order the minor to pay, in addition to any other penalty provided or imposed under the law, ... the following:

[¶]...[¶] (B) Restitution to the victim or victims, if any, in accordance with subdivision (h)." And subdivision (h) of section 730.6 provides, in relevant part, that such restitution "shall be of a dollar amount sufficient to fully reimburse the victim or victims for all determined economic losses *incurred as the result of the minor's conduct* for which the minor was found to be a person described in Section 602" (Italics added.)

We review the court's findings imposing direct victim restitution for abuse of discretion. (*People v. Mearns* (2002) 97 Cal.App.4th 493, 498.) In fixing the amount of restitution, "the trial court must use a rational method that could reasonably be said to make the victim whole, and may not make an order which is arbitrary and capricious." (*People v. Thygesen* (1999) 69 Cal.App.4th 988, 992.) A trial court does not abuse its

⁵ All further statutory references are to the Welfare and Institutions Code unless otherwise indicated.

discretion in setting restitution if there is a “factual and rational basis” for the amount set. (*People v. Carbajal* (1995) 10 Cal.4th 1114, 1125.)

Here, in ordering victim restitution, the court relied on a theory that appellant conspired to distribute and conceal stolen property. The People acknowledge that appellant was neither charged with nor adjudicated of the offense of conspiracy. Nonetheless, the People argue, this factor notwithstanding, there was a factual and rational basis for the court’s restitution order because the record supports the court’s findings that (1) appellant engaged in a conspiracy, and (2) this conduct caused the victims’ loss. We assume without deciding that even though section 730.6, subdivision (h) authorizes direct restitution “for all determined economic losses incurred as the result of the minor’s conduct *for which the minor was found to be a person described in Section 602*” (italics added), restitution may be based on conduct other than the offense for which appellant was adjudicated.⁶ Nonetheless, the People’s argument fails.

“Pursuant to [Penal Code] section 182, subdivision (a)(1), a conspiracy consists of two or more persons conspiring to commit any crime. A conviction of conspiracy requires proof that the defendant and another person had the specific intent to agree or

⁶ Appellant does not dispute this point. Both he and the People cite to *People v. Carbajal, supra*, 10 Cal.4th 1114, where the California Supreme Court rejected the defendant’s arguments that restitution was limited to losses caused by the crime of which a defendant is convicted and disapproved its previous decision in *People v. Richards* (1976) 17 Cal.3d 614, insofar as it precluded ordering restitution for a crime or an act committed with the same state of mind as the offense of which he was convicted, and held that a trial court has discretion to “order restitution as a condition of probation where the victim’s loss was not the result of the crime underlying the defendant’s conviction” if restitution serves one of the purposes of probation. (*People v. Carbajal, supra*, 10 Cal.4th at p. 1122.) The court in *Carbajal* noted, “Under certain circumstances, restitution has been found proper where the loss was caused by related conduct not resulting in a conviction [citation], by conduct underlying dismissed and uncharged counts [citation], and by conduct resulting in an acquittal [citation].” (*Id.* at p. 1121.)

conspire to commit an offense, as well as the specific intent to commit the elements of that offense, together with proof of the commission of an overt act ‘by one or more of the parties to such agreement’ in furtherance of the conspiracy. [Citations.] “[¶]...[¶]” “ ‘ ‘ ‘In contemplation of law the act of one [conspirator] is the act of all. Each is responsible for everything done by his confederates, which follows incidentally in the execution of the common design as one of its probable and natural consequences’ ” ’ [Citations.] Thus, ‘[i]t is not necessary that a party to a conspiracy shall be present and personally participate with his co-conspirators in all or in any of the overt acts.’ [Citation.]” (*People v. Morante* (1999) 20 Cal.4th 403, 416-417, fns. omitted.)

“To sustain a conviction for conspiracy the prosecution must show not only that the conspirators intended to agree but also that they intended to commit the elements of the offense. [Citation.] In proving a conspiracy, however, it is not necessary to demonstrate that the parties met and actually agreed to undertake the unlawful act or that they had previously arranged a detailed plan. The evidence is sufficient if it supports an inference that the parties positively or tacitly came to a mutual understanding to commit a crime. Therefore, conspiracy may be proved through circumstantial evidence inferred from the conduct, relationship, interests, and activities of the alleged conspirators before and during the alleged conspiracy. [Citation.]” (*People v. Prevost* (1998) 60 Cal.App.4th 1382, 1399.) “While ‘mere association’ cannot establish a conspiracy, ‘[w]here there is some evidence of participation or interest in the commission of the offense, it, when taken with evidence of association, may support an inference of a conspiracy to commit the offense.’ [Citation.]” (*Id.* at p. 1400.)

The evidence that Megan, on two occasions, gave appellant portions of the money she stole supports the conclusion that appellant and Megan “came to a mutual understanding” and therefore conspired “to commit a crime” (*People v. Prevost, supra*, 60 Cal.App.4th at p. 1399), viz., “conceal[ing]” and/or “withhold[ing]” property they knew to be stolen, in violation of Penal Code section 496, subdivision (a). But the People

overstate the scope of the conspiracy in which appellant participated. It is reasonably inferable that appellant was part of a conspiracy to conceal and withhold the portion of the victims' money that came into his possession. But it is not reasonably inferable that appellant agreed to conceal or withhold the balance of the money Megan initially took from the victims' drawer.

We recognize appellant was aware soon after the initial theft of the total amount Megan had taken. We also recognize it is reasonably inferable that appellant was aware Megan gave R.W. \$2,000. But these factors do not support the inference that appellant, tacitly or otherwise, agreed to participate in conjunction with Megan, or Megan and one or more other persons, to conceal and/or distribute money beyond that which appellant received. The People's contention to the contrary is speculation, unsupported by the record.

On this record, the loss that resulted from appellant's conduct must be measured by the amount that came into his possession. There is no rational and factual basis for the conclusion that appellant caused a loss in the amount of \$20,000.

DISPOSITION

The order imposing joint and several liability for direct restitution in the amount of \$20,000 is reversed, and the matter is remanded to the juvenile court to determine the losses actually suffered by the victims as a result of appellant's conduct.